UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

MARY ESTER MACFARLANE, individually and as the Administrator of the Estate of D. KENNETH MACFARLANE, PATRICK MACFARLANE, SCOTT MACFARLANE, CHRISTOPHER MACFARLANE, and KELLY GILL, Plaintiffs,	:	
v.	:	Docket No. 1:99-cv-100
CANADIAN PACIFIC RAILWAY COMPANY, as successor in interest to Delaware & Hudson Railroad, and NATIONAL RAILROAD PASSENGER CORPORATION, Defendants.	:	

RULING ON PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS
(Paper 131)

Plaintiffs move for sanctions against Defendant National Railroad Passenger Corporation ("Amtrak") under Fed. R. Civ. P. 11(b)(3) and 11(c), alleging Defendant made a factual misrepresentation to the Court in November 2000. For reasons stated below, Plaintiffs' motion is DENIED.

BACKGROUND

The facts underlying this action are set forth in previous decisions of this Court (Papers 36 and 44), familiarity with which is assumed. For purposes of the

instant motion, however, a brief discussion of the procedural history is helpful.

In January 1999, Plaintiffs brought this wrongful death action against Amtrak, alleging it failed to operate its train safely. Specifically, Plaintiffs alleged Amtrak operated its train at an unsafe rate of speed and failed to give proper auditory warning of the train's approach. Amtrak moved for summary judgment, and in September 2000 the Court granted partial summary judgment to Amtrak on the claim of excessive speed, but not on the issue of inadequate auditory warning.

Amtrak filed a renewed motion for summary judgment on November 7, 2000, based on a factual representation that now underlies Plaintiffs' Rule 11 motion. In Amtrak's renewed motion, Amtrak argued there was no triable issue of fact as to the adequacy of the train's warning whistle. The basis of this contention was a factual misrepresentation: Amtrak cited testimony of the train engineers that the warning whistle was sounded at the whistle post and that the post was located 1750 feet from the crossing, from which Amtrak deduced the whistle was sounded nearly 25 seconds prior to collision, exceeding the time deemed by Plaintiffs' expert to be reasonable. Notably, data from the relevant time period was missing from the train's event recorder, which functions

like a "black box" on an aircraft. Nonetheless, the Court was persuaded by Amtrak's argument and granted summary judgment to Amtrak on the claim of inadequate warning (Paper 44).

Plaintiffs appealed, and on January 2, 2002, the Second Circuit Court of Appeals vacated the summary judgment granted on the inadequate warning claim. The Circuit reasoned that since data was missing from the train's event recorder for the time period at issue, the absence of data created a genuine issue of material fact for trial. On remand, Amtrak was not able to locate the missing data from the event recorder. Other evidence, however, was found to refute Amtrak's representation that the whistle was sounded nearly 25 seconds prior to collision. This new evidence was in the form of a graphical depiction generated by the event recorder, which both parties had in their possession at the time of the alleged rule 11 violation. For reasons that remain unclear, neither party deciphered the graphical depiction, and thus both parties failed to recognize the factual misrepresentation before the Court ruled on the renewed motion for summary judgment.

Although it was clearly too late for Amtrak to withdraw its renewed motion for summary judgment which contained the factual misrepresentation, when brought to its attention

Amtrak's counsel acknowledged its factual error and stated on the record it would abandon that contention. Now, nearly four years after Amtrak filed the offending motion, Plaintiffs move for Rule 11 sanctions against Amtrak, claiming Amtrak's factual error represents a "deliberate and calculated effort to mislead." (Paper 132 at 7). Amtrak insists its misrepresentation was supported by facts at the time and resulted from oversight rather than effort to mislead or failure to investigate facts.

DISCUSSION

Plaintiffs bring their motion pursuant to Fed. R. Civ. P. 11(b) and 11(c). Rule 11(b) states:

> By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of that person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances, . . . (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b). A party may seek sanctions, "if after notice and a reasonable opportunity to respond" the court determines the rule has been violated. Fed. R. Civ. P. 11(c).

In support of their motion, Plaintiffs cite only one case, Elliot v. The M/V Lois B, 980 F.2d 1001 (5th Cir.

1993). Elliot involved egregious misconduct: in an attempt to thwart creditors, a litigant fraudulently transferred title to a boat by engaging in acts such as backdating sale documents. While the conduct in this case appears to fall far short of the fraud perpetrated in Elliot, the Court need not reach the merits of Plaintiffs' motion because their efforts to pursue sanctions at this late stage are untimely.

Notably, when Rule 11 was amended in 1993, a "safe harbor" provision was added, providing an opportunity to withdraw or correct a challenged submission. Although Rule 11 does not specify when a party must file a motion thereunder, its drafters advise early action:

> Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. . . . Given the "safety harbor" provisions . . . a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Fed. R. Civ. P. 11 Advisory Committee's Note (1993 Amendments). The Second Circuit has observed that absent an explicit time limit for serving the motion, "the 'safe harbor' provision functions as a practical time limit, and motions have been disallowed as untimely when filed after a point in the litigation when the lawyer sought to be sanctioned lacked a meaningful opportunity to correct or withdraw the challenged submission." In re Pennie & Edmonds LLP, 323 F.3d 86, 89 (2d Cir. 2003)(citations omitted); see

also 2 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 11.22[1](c) (3d ed. 2001)("At the very least, a party must serve its Rule 11 motion before the court has ruled on the pleading . . . Otherwise the purpose behind the 'safe harbor' provision would be nullified.").

Consequently, the instant motion, filed nearly four years after the alleged violation, is untimely. See, e.g., Gen. Motors Acceptance Corp. v. Bates, 954 F.2d 1081, 1086-87 (5th Cir. 1992)(affirming district court's denial of a Rule 11 motion filed over two and a half years after alleged violation); Weinreich v. Sandhaus, 156 F.R.D. 60, 63 (S.D.N.Y. 1994) (denying Rule 11 motion as untimely where alleged violations occurred three to six years before motion was filed).

CONCLUSION

Plaintiffs' motion for sanctions is DENIED.

SO ORDERED.

Dated at Brattleboro, Vermont this ___ day of August, 2004.

_____
J. Garvan Murtha, U.S. District Judge